concerns that today's television programming is characterized more by sex and violence than family values. In developing this family-oriented package of programming, PAXTV will provide a unique alternative for both advertisers and viewers. And, through ownership of its primary distribution system, its UHF stations, Paxson can ensure that this unique alternative not only has present staying power among advertisers and viewers but also has the distribution base necessary to grow and develop into a full-fledged network. The total economics of the ownership of the network's distribution (national, network and local) will be the basic factor allowing PAXTV to offer competitive programming.

Retaining the UHF discount also will provide added incentive for future broadcast networks. Like Paxson, an entity contemplating the launch of a network must have a strong incentive to network its programming. It can only do so if it is permitted to own a significant amount of its television distribution. The UHF discount in part will keep open the door for future broadcast networks to develop a network organization in a similar manner, thus further enhancing the level of diversity and competition among program networks.

D. *Existing Ownership Interests Should Be Grandfathered in the Event the Commission Limits or Eliminates the UHF Discount.*

As demonstrated above, there is no basis for the Commission to eliminate or narrow the scope of the UHF discount. However, should the FCC decide to take such action, Paxson urges the Commission to grandfather all ownership interests existing at the time of its decision which would not comply with the national ownership rule absent the UHF discount. Grandfathering of existing ownership interests not only would be the fairest solution but also would be consistent with established precedent.

Paxson currently owns 49 television stations nationwide; after the completion of pending transactions, it will own 69 stations nationwide representing 66.3% of the television households in the country. Absent the UHF discount, Paxson's ownership interests would exceed the national cap. To require Paxson (and similarly-situated group owners) to divest their interests if the UHF discount is eliminated would be manifestly unfair and not in the public interest and the seventh network would cease to exist. Neither Paxson nor other group owners should be penalized for their full compliance with the FCC's ownership rules at the time those rules were in effect. Although the FCC has in various proceedings discussed whether to retain or modify the UHF discount, it has not suggested, as it has with other pending ownership rule changes[49] that it would require divestitures upon a change in the rule nor has it conditioned the grant of sale applications on the outcome of pending proceedings. Moreover, requiring Paxson to divest a portion of its stations, part and parcel of the PAXTV network, could seriously hamper PAXTV's ability to compete in the network business and to expand its original program offerings.

In the face of changes to its ownership rules, the Commission has in the past grandfathered ownership interests that would not comply with the new rule. In those cases, the Commission concluded that forced divestiture would have consequences adverse to the public interest and therefore should be undertaken only in the most serious of circumstances.

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[49] *See, e.g., Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making*, MM Docket Nos. 91-221, 87-7, 11 FCC Rcd 21655, 21672, ¶ 38 (1996) (adopting interim duopoly waiver policy conditioned on outcome of Rule Making proceeding) ("*Second Further Notice*"); *Shareholders of Citicasters, Inc.*, 11 FCC Rcd 19135 (1996) (announcing policy that certain waivers of one-to-a-market rule would be conditioned on outcome of television ownership proceeding).

For instance, when the Commission adopted the newspaper/broadcast cross-ownership prohibition in 1975, it required ownership divestitures only in the most "egregious" of cases, recognizing that "stability and continuity of ownership do serve important public purposes."[50/] In that proceeding, the Commission only required divestiture where the commonly-owned newspaper and broadcast interests had a monopoly in a community such that no other radio or television voice could be expected to serve the local community's needs and interests.[51/] The Commission reached a similar conclusion in not requiring divestiture of existing radio/television combinations which pre-existed the adoption of the radio/television cross-ownership rule.[52/]

The same rationale supports grandfathering of existing ownership interests in the event the Commission eliminates or restricts the UHF discount. The Commission must weigh the diversity and competitive benefits of divestiture against the adverse impact on local stations and network programming. Paxson submits that divestiture of its stations would have no benefit for the public in terms of increased diversity or competition. Of the 1,211 licensed commercial television stations in the United States,[53/] Paxson would own only 69,

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50/ *Amendment of Sections 73.34, 73.240, and 76.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, *Second Report and Order*, Docket No. 18110, 50 FCC 2d 1046, 1078, 1080 ("*1975 Second R & O*"), *recons. granted*, *Memorandum Opinion and Order*, Docket No. 18110, 53 FCC 2d 589 (1975), *modified*, *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977).

51/ *1975 Second R & O*, 50 FCC 2d at 1081-82.

52/ *Id.* at 1054.

53/ *Broadcast Station Totals As of May 31, 1998*, *News Release* (rel. June 19, 1998).

only slightly more than 5% of the total number of commercial television stations. Notwithstanding this relatively small percentage, Paxson's stations will represent a new programming voice, offering viewers and advertisers a viable and wholesome alternative to other network programming, and contributing to diversity and economic competition in local markets. Forced divestiture would only result in disruption of local programming and service and most likely a discontinuation of PAXTV network programming in local markets. Divestiture also could adversely impact PAXTV as a whole. If the network is not able to retain ownership of its distribution in the early years of its development, its chances of succeeding as an effective competitor to other networks will be slim indeed. In short, there would be no benefit to the public if Paxson was forced to divest a portion of its owned stations to comply with the national ownership rule.

A decision not to grandfather existing ownership interests also would violate existing constitutional and judicial restraints on the retroactive application of legislative rules. Section 551(4) of the Administrative Procedure Act defines a legislative rule as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[54/]

Courts have emphasized that this provision requires administrative rules to be primarily concerned with the future rather than with past conduct.[55/] Retroactive rules are thus viewed with judicial suspicion and are subject to strict scrutiny because they interfere with the legally

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[54/] 5 U.S.C. § 551(4)(1994) (emphasis added).

[55/] *See, e.g., American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973); *Energy Consumers & Producers Ass'n, Inc. v. Department of Energy*, 632 F.2d 129 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980).

induced, settled expectations of private parties.[56] The Supreme Court recognizes that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it provides 'an exceedingly persuasive justification.'"[57] This Commission, too, has recognized that retroactive application of rules and procedures is inequitable and disruptive to business.[58]

A five-factor test has been used in determining whether a new rule being applied retroactively violates constitutional requirements:[59] (1) whether the case is one of first impression; (2) whether the new rule is an abrupt departure from past practices or merely attempts to fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden retroactivity would impose; and (5) the statutory interest in applying the new rule despite reliance on the old one. Any decision by the FCC not to grandfather existing UHF ownership interests cannot pass this test.

This is not a case of first impression and it would be a significant departure from past practice: the Commission has consistently grandfathered nonconforming existing interests when it adopted new ownership restrictions. *See, e.g.*, *Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations*, *First Report and Order*, 53 FCC 2d 1102 (1975) (grandfathering broadcast-cable cross-ownership); *1975 Second R & O*, 50 FCC 2d at 1074

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[56] Retroactive rules are not *per se* improper. *E.L. Wiegand Div. v. NLRB*, 650 F.2d 463, 471 (3d Cir. 1981), *cert. denied*, 455 U.S. 939 (1982).

[57] *Heckler v. Mathews*, 465 U.S. 728, 746 (1984) (citation omitted).

[58] *Cf. Amendments of Parts 20 and 24 of the Commission's Rules*, *Report and Order*, WT Docket No. 96-59, 3 Communications Reg. (P&F) 433, 471 (1996); *CATV of Rockford, Inc.*, 38 FCC 2d 10, 15 (1972), *recons. denied*, 40 FCC 2d 493 (1973).

[59] *See, e.g.*, *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *Adelphia Cable Partners, L.P.*, 2 Communications Reg. (P&F) 76, 82 & n.42 (1995).

(grandfathering broadcast-newspaper cross-ownership); *Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting*, *Memorandum Opinion and Order*, Docket No. 12782, 25 FCC 2d 318, 318 (1970) (no divestiture required by new multiple ownership rules), *aff'd*, *Mansfield TV, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Memorandum Opinion and Order*, Docket No. 14711, 3 RR 2d (P&F) 1554 (1964) (existing combinations grandfathered notwithstanding adoption of new contour overlap standards); *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, *First Report and Order*, Docket No. 20548, 63 FCC 2d 824 (regional concentration of control rules include grandfathering provisions), *modified in part*, 67 FCC 2d 54 (1977); *Amendment of Section 73.636(a) of the Commission's Rules Relating to Multiple Ownership of Television Broadcast Stations*, *Notice of Proposed Rule Making and Memorandum Opinion and Order*, Docket No. 16068, 5 RR 2d (P&F) 1609 (1965) (Top 50 Market policy includes grandfathering provisions). A failure to grandfather existing ownership interests would be a radical and unjustified departure from this longstanding practice.

Further, entities that have acquired UHF stations relied on Commission rules permitting the acquisitions based on application of the UHF discount. The courts have long recognized that fairness and equity are dispositive in determining the acceptability of retroactive regulation.[60] Here, it would be grossly inequitable for the Commission to require divestiture of stations acquired in good faith and reliance on the regulatory regime.

Retroactive application of a new national ownership rule also would impose significant burdens on UHF stations. Many of the UHF stations acquired by Paxson over the last four years are weaker or newly-constructed UHF stations that would be economically devastated if divestiture is required. Under separate ownership, these stations would not have the same access to low cost, competitive diverse programming or significant financial resources, both of which are critical for newly operating and weaker stations. Forcing Paxson to sell these stations would adversely impact these stations' economic survival and, in turn, their service to the public.

Finally, there would be no statutory interest in applying the new rule. Congress has only required that the Commission review the UHF discount as part of an overall review of the ownership rules. There has been no mandate from Congress to repeal the UHF discount nor has Congress suggested that if ownership rule changes are adopted, they should be applied retroactively.

Failure to grandfather existing UHF ownership interests would retroactively apply new rules and requirements to the extreme disadvantage of parties' reasonable reliance interests. Not only would such action disserve the judicially-recognized legitimate government objective of protecting such interests: it would also disserve the public interest in enhanced television service.

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[60] *See, e.g.*, *Helvering v. Griffiths*, 318 U.S. 371, 402 (1943); *NLRB v. E & B Brewing Co.*, 276 F.2d 594, 600 (2d Cir. 1960), *cert denied*, 366 U.S. 908 (1961).

III. THE NATIONAL TELEVISION OWNERSHIP RULE.

Congress's elimination of the national ownership rule's 12-station cap and increase of the national audience reach limit to 35% in 1996 was a realistic and appropriate response to the changing nature of the television industry. Over the past two years, there has been additional growth and development in the industry warranting further review of the audience share limit. Paxson respectfully urges that in addition to retaining the UHF discount, the Commission increase to 40% the national audience share cap. A 40% limit would reflect the realities of the broadcast, cable and DBS programming marketplace while still ensuring that consolidation in local markets does not reach levels adverse to the public interest. In fact, since Congress raised the cap in 1996, it may be appropriate for the Commission to return this very issue to Congress for further revision.

It cannot be denied that the national video programming market is highly competitive and diverse, offering viewers as well as advertisers numerous high quality program alternatives.[61] Television broadcast stations, low power television stations, broadcast networks, cable program networks, and direct broadcast satellite services all offer a broad and growing diversity of programming and compete with each other for viewers and advertiser revenues. The level of competition in the industry makes it unlikely that a single entity with ownership interests nationwide of 40% of television households would be able to garner any market share that would constitute an unreasonable concentration of control. Industry publications report that cable capacity, on average, increased by 13 channels in 1996

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[61] *See* Mark R. Fratrik, Ph.D., "Media Outlets By Market - Update," *submitted with* the Comments of NAB, MM Docket No. 98-35, July 21, 1998.

and 14 channels in 1997, and is expected to increase by 14 channels in 1998. As cable capacity increases, there is increased diversity of voices in the total television universe which includes broadcast, cable and DBS. Paxson's own study and proposal for increased minority ownership reveals construction permits and pending applications that could produce over 100 new commercial television stations. *See supra* note 62. This would increase by 10% the number of operating commercial television stations and, if Paxson's proposal is fully adopted by the Commission, even more new stations could be constructed.

A moderate increase in the ownership cap would have substantial public interest benefits. As noted above, ownership of television stations has become economically critical to the development and continued feasibility of all national broadcast television networks. With the extensive competition for network affiliates, PAXTV has found it necessary to rely on an owned distribution system to reach viewers and advertisers. Under Paxson's paradigm of network organization, a new network must own its distribution outlets and receive the network, national, and local revenues from its programming if it is going to provide attractive high quality programming that will be competitive with the major broadcasting networks and the numerous cable and DBS networks. In fact, as television audiences continue to fractionalize, this paradigm will apply to ABC, CBS and NBC as well as emerging networks. Increasing the audience share cap would allow emerging networks such as PAXTV to acquire a strong distribution base, providing a further incentive to develop and distribute innovative original programming on a national level.

It also is likely that making this slight increase in the ownership cap would increase small-market and minority-owned broadcasters' opportunities to attract capital investments.

With an increased ownership cap, more established broadcasters such as Paxson and other potential providers of financial capital and programming would have a greater incentive to invest in small and minority-owned broadcast entities.[62] Such capital investments will be particularly crucial to the survival and success of weaker or minority-owned stations as the television industry begins the long road to DTV implementation and competition for advertisers and viewers becomes more intense.

IV. THE LOCAL TELEVISION OWNERSHIP RULE.

As part of its biennial review of the broadcast ownership rules, the Commission should not ignore the importance of relaxing one television ownership rule as well. This rule currently provides that a single entity may not own two or more television stations if the stations' Grade B signal contours overlap. 47 C.F.R. § 73.3555(b). Recognizing that this prohibition is unduly restrictive, the Commission has proposed in a separate Rule Making to permit common ownership of two television stations provided the stations' Grade A contours do not overlap and the stations are located in separate DMAs.[63] Paxson submits that the

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[62] Paxson has already answered FCC Chairman William Kennard's call for proposals to increase minority ownership in the broadcast industry. On July 1, 1998, Paxson submitted to the FCC its "Proposal to the FCC to Increase Broadcast Diversity" (the "Paxson Diversity Plan"), which if implemented could result in the licensing of an additional 100 television stations. The Paxson Diversity Plan proposes a joint government-industry initiative that would seek to overcome traditional barriers to minority broadcast ownership, such as accessing sufficient capital resources and acquiring high quality programming. Under this plan, existing holders of construction permits would have until December 1, 1998 to enter into agreements with programming and/or financial sources for the construction and programming of new stations. Under the Paxson Diversity Plan, an entity providing programming and/or financing also would be permitted to hold a 33% equity interest in an unbuilt station without triggering application of the national audience reach cap.

[63] *Second Further Notice*, 11 FCC Rcd at 21662, ¶ 13.

Commission's proposal must be taken a step further. The Commission should adopt an ownership rule that would permit common ownership of television stations provided they are not located in the same DMA irrespective of contour overlap. This would ensure that the Commission's television ownership rule accurately reflects the economics of the television marketplace while still ensuring widespread diversity and vigorous competition in local markets.

Both the DMA (developed by A. C. Nielsen) and the Area of Dominant Influence ("ADI") (developed by Arbitron) are market concepts that assign every county (or, in some cases, discrete portions of counties) to a particular television market based on market stations' measured viewing patterns. As illustrated by the following chart, many stations that have overlapping Grade A or Grade B contours are assigned by Nielsen to different DMAs. Nielsen (and previously Arbitron) have assigned these stations to separately defined markets, notwithstanding contour overlap, recognizing that the stations target different audiences and different advertising markets.

Separate But Closely-Situated DMAs
Providence, RI - Boston, MA
San Diego, CA - Los Angeles, CA
West Palm Beach, FL - Miami, FL
Detroit-Ann Arbor, MI - Lansing, MI
Raleigh-Durham, NC - Greensboro-High Point, Winston-Salem, NC
Chicago, IL - Milwaukee, WI

Commercial television market designations (the DMA and its predecessor, the ADI) have long been used in Commission rules, particularly ownership rules, that require an accurate measure of, or reference to television stations' actual market areas. For example, ADIs were used to determine what stations were subject to the Commission's now-deleted "Top 50 market policy"[64] and its Prime Time Access Rule.[65] ADIs are used in determining the area within which channel 6 television stations are protected from interference from noncommercial educational FM stations. 47 C.F.R. § 73.525(e)(3)(iii). ADI television households are used to determine compliance with television national audience caps. 47 C.F.R. § 73.3555(e)(2). A station's ADI assignment determines its eligibility for a waiver of the one-to-a-market rule. 47 C.F.R. § 73.3555 n. 7(1). National networks' cable system ownership is restricted with reference to location within an ADI. 47 C.F.R. § 76.501(b)(2)(ii). Finally, stations' ADI assignments have long determined carriage and exclusivity rights under the Commission's cable television rules. *See former* 47 C.F.R. §§ 76.57 -76.63; 76.151; 47 C.F.R. § 76.51.[66] In short, the ADI (and now the DMA[67]) is a

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[64] *See*, *Amendment of Section 73.636(a) of the Commission's Rules Relating to Multiple Ownership of Television Broadcast Stations, Report and Order*, Docket No. 16068, 22 FCC 2d 696 (1968).

[65] 47 C.F.R. §§ 73.658(k) (repealed, *Review of the Prime Time Access Rule, Report and Order*, MM Docket No. 94-123, 11 FCC Rcd 546 (1995)), 73.662.

[66] *See also* Satellite Compulsory Extension Act of 1994, S. Rep. No. 103-107, 103rd Cong. 2d Sess. 15 (1994) (DMAs or other accepted measure used to determine markets for copyright purposes).

[67] *See ValueVision International, Inc.*, 11 FCC Rcd 14128, 14130, ¶ 4 n.1 (1996) (DMAs are substitutes for ADIs). The Commission has expressly recognized that the DMA's design and use are identical to that of the ADI. *Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules*, *Notice of Proposed Rule Making*, CS Docket No. 95-178, 11 FCC Rcd 1904, 1905 ¶¶ 6, 7 (1995).

recognized, established, accurate, realistic measure of a television station's actual market, long used in Commission regulations. As such, it is eminently well-suited as the controlling geographic standard for a modified television duopoly rule.

Congress has expressly recognized that the ADI -- now the DMA -- accurately measures the area in which stations impact diversity and economic competition. The 1992 Cable Act[68/] directs use of a market measure based on Section 73.3555(d)(3)(i) of the Commission's Rules to determine stations' mandatory carriage rights.[69/] Congress' requirement was based on its recognition that "ADI [DMA] lines establish the markets in which television stations buy programming and sell advertising" and its conclusion that "ADI lines are the most widely accepted definition of a television market and more accurately delineate the area in which a station provides local service than any arbitrary mileage-based definition."[70/]

More recently, Senators Conrad Burns (R. Montana) and John McCain (R. Arizona) have confirmed that the DMA provides the most realistic and practical standard for defining permissible television ownership. On July 14, 1998, both Senators introduced legislation proposing that the current "impractical restrictions" on television ownership be removed and that the Commission adopt an ownership rule permitting common ownership of television

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68/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

69/ Redesignated Section 73.3555(e)(3)(i), this provision uses ADIs to measure a television station's audience reach.

70/ Cable Television Consumer Protection and Competition Act of 1992, H. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

stations provided they are located in different DMAs, irrespective of contour overlap.[71] The introduction of this legislation provides a compelling basis for Paxson's suggested change to the television ownership rule.

The Commission, too, has consistently recognized that DMAs (ADIs) truly reflect stations' markets in granting waivers of its ownership rules to stations assigned to different DMAs (ADIs) notwithstanding Grade B contour overlap.[72] DMAs, in other words, delineate precisely those areas that logically should be the focus of the agency's television ownership regulations.

Modification of this rule to permit common ownership of stations assigned to different DMAs regardless of contour overlap would advance explicit Congressional and Commission recognition that DMAs accurately describe the areas within which television stations compete. Advertising and programming are bought and sold based on DMAs, not on service contour location. Viewers within a DMA identify with stations assigned to that DMA -- that is the essence of the DMA's definition, which depends on preponderance of viewing. They do not identify with or significantly view stations that may provide technical -- but not programming or advertising -- service to their areas.[73] Both Congress and the Commission

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71/ S.3206, 105th Cong., 144 Cong. Rec. S8138 (July 14, 1998).

72/ *See, e.g.*, *Thomas J. Flatley*, 7 FCC Rcd 4242 (1992); *Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841 (1996); *WHOA-TV, Inc.*, 11 FCC Rcd 20041 (1996); *KNSD License, Inc.*, 11 FCC Rcd 20394 (1996); *Act III Communications Holdings, L.P.*, 11 FCC Rcd 5735 (1996); *Cincinnati TV 64 Limited Partnership*, 11 FCC Rcd 18835 (1996); *Weigel Broadcasting Company*, 11 FCC Rcd 17202 (1996).

73/ For example, Baltimore stations provide Grade A or B coverage to portions of the Washington, D.C., DMA (and vice versa) but do not carry local Washington, D.C. news.

recognized this fact of television life in tying mandatory carriage rights to location within an ADI (DMA). Similar recognition must guide the Commission's decision here, particularly given that some of these stations with overlapping contours will be denied cable carriage if they carry the same network programming. The common ownership of such stations will help alleviate the concerns of any such non-cable carriage.

DMA assignment, which is a direct function of viewership and thus competition for advertisers, constitutes a logical and rational standard for application of the ownership rules. DMAs are definite and readily definable. In other words, as they have in other rules, DMAs provide an ideal administrative tool for realistically revised Commission ownership regulations.

V. CONCLUSION.

Paxson applauds the Commission's efforts to undertake the challenging and broad review of the broadcast ownership rules. As set forth in the *Notice of Inquiry*, the Commission's action in this proceeding must be guided by its traditional dual goals of fostering diversity and competition while at the same time ensuring that its rules reflect the economic realities of the marketplace. Those goals will best be realized if the FCC (a) retains the UHF discount both to reflect the continuing physical and economic disparity between UHF and VHF stations now and in the coming DTV world and to encourage the growth of new broadcast networks; (b) increases the national audience reach cap to 40% to reflect the significant levels of diversity and competition in the total television universe of broadcast, cable and DBS; and (c) recognizes the economic realities of television competition by relaxing the television ownership rule to permit common ownership of television stations without regard to contour overlap provided the stations are in different DMAs.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

By: ______________________________
John R. Feore, Jr.
Elizabeth A. McGeary

Its Attorneys

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000
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EXHIBIT A

UHF/VHF -- COMPARATIVE EQUIPMENT AND ELECTRICITY COSTS*

UHF/VHF	Max. Effective Radiated Power	Transmitter Power Output	Efficiency Factor	Electric Power Required	Cost of Electricity Per Year (based on a cost of $.07 per kw/per hour)	Transmitter Cost	Antenna/Transmission Line Costs
Low VHF (Ch. 2 - 6)	100 KW	40 KW	35%	114 KW	$ 69,905	$ 400,000	$250,000
High VHF (Ch. 7 - 13)	316 KW	60 KW	35%	171 KW	$104,857	$ 700,000	$400,000
UHF	**5,000 KW**	**240 KW**	**55%**	**437 KW**	**$267,968**	**$1,250,000**	**$750,000**

1/ Information provided by Comark.

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